

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

NO. CR-06-2088-EFS

Plaintiff,

v.

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS, DENYING
DEFENDANT'S MOTION RE: GRAND
JURY TRANSCRIPTS, AND GRANTING
DEFENDANT'S MOTION FOR A
CONTINUANCE**

MARTIN GUZMAN-GUZMAN,

Defendant.

On September 18, 2006, the Court conducted a pretrial conference in the above-captioned matter. Before the Court was Defendant's Motion to Dismiss Case and Indictment (Ct. Rec. 31) and Defendant's Motion for Discovery Re: Grand Jury Testimony (Ct. Rec. 32). After reviewing the submitted material and applicable authority and hearing arguments on the motion to dismiss, the Court denied the motion. This Order serves to memorialize and supplement the Court's oral rulings.

I. Motion to Dismiss**A. Factual Background**

On April 22, 1996, Defendant was convicted of Delivery of a Controlled Substance, in Klickitat County Superior Court, and was sentenced to a term of imprisonment of 24 months. (Ct. Rec. 39.) Neither the Government nor Defendant's brief state whether the conviction

1 was based on a plea. The Government contends that Defendant's offense
2 was not a deportable offense at that time. *Id.* at 11. Two days later,
3 on April 24, 1996, Congress passed section 440(d) of the Antiterrorism
4 and Effective Death Penalty Act (AEDPA), which made all persons
5 designated as aggravated felons ineligible for relief from deportation.
6 8 U.S.C. § 1182.

7 On May 24, 1996, Defendant was served with an Order to Show Cause
8 and Notice of Hearing. (Ct. Rec. 39 at 2.) On November 6, 1997,
9 Defendant appeared before an Immigration Judge (IJ). *Id.* The IJ
10 determined Defendant was not eligible for relief and ordered Defendant
11 deported. *Id.* Defendant appealed the decision on November 28, 1997,
12 arguing that his conviction occurred at a time when he would have been
13 eligible for "212(c) relief." See Law of April 24, 1996, 8 U.S.C. §
14 1182(c) (repealed September 30, 1996).

15 On September 8, 1998, the Board of Immigration Appeals (BIA)
16 affirmed the November 6, 1997, decision of the IJ. (Ct. Rec. 39 at 2.)
17 On November 16 of that year, Defendant appealed the decision to the Ninth
18 Circuit. *Id.* The Ninth Circuit dismissed the appeal based on a lack of
19 jurisdiction given that Defendant's petition for judicial review was not
20 timely filed. *Id.* On June 11, 1999, Defendant was removed from the
21 United States. *Id.*

22 On December 22, 2000, Defendant was discovered in White Salmon,
23 Washington following a traffic accident. The Immigration Service
24 determined that Defendant had been previously removed from the United
25 States and on December 28, 2000, issued a Notice of Intent/Decision to
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1 Reinstated Prior Order. *Id.* Defendant was removed on January 16, 2001.
2 *Id.* at 3.

3 On April 26, 2006, the Klickitat County Sheriff's Office advised the
4 Immigration Service of Defendant's presence in their county. *Id.*
5 Defendant was indicted on May 16, 2006, under 8 U.S.C. § 1326, alleging
6 a removal date of January 16, 2001. (Ct. Rec. 1.)

7 Defendant moves to dismiss his Indictment on the grounds that the
8 underlying deportation was fundamentally flawed.

9 B. Analysis and Conclusion

10 The text of 8 U.S.C. § 1326 permits collateral attack of the
11 underlying deportation order if:

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13 (1) the alien exhausted any administrative remedies that may
14 have been available to seek relief against the order; (2) the
15 deportation proceedings at which the order was issued
16 improperly deprived the alien of the opportunity for judicial
17 review; and (3) the entry of the order was fundamentally
18 unfair.

19 8 U.S.C. § 1326(d). Typically in § 1326 cases challenging the validity
20 of the underlying deportation, the Ninth Circuit has used a due process
21 test to determine whether the deportation was proper. *United States v.*
22 *Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998) (holding that a
23 collateral attack can be successful if the defendant demonstrates "(1)
24 his due process rights were violated by defects in his underlying
25 deportation proceeding, and (2) he suffered prejudice as a result of the
26 defects."); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir.
2004).

1 In his Motion to Dismiss, Defendant attacks both the reinstated
2 removal order of December 2000, which serves as the basis for his
3 indictment, and the original removal order of November 1997, which was
4 the basis for the reinstated removal order. (Ct. Rec. 31.)

5 *1. November 1997 Removal Order*

6 Defendant argues "the 1997 Removal Order is also in violation of
7 law," under the Supreme Court's holding in *INS v. St. Cyr*, 533 U.S. 289
8 (2001). (Ct. Rec. 31 at 5.) In *St. Cyr*, the Court held that so called
9 § 212(c) relief that was available to aliens at the time of their plea
10 agreement would remain available to them, as a ruling otherwise would
11 result in an impermissive retroactive application of the law. *St. Cyr*,
12 533 U.S. at 326. The Government counters that prior to the passage of
13 the IIRIRA and AEDPA, aliens were only subject to deportation for crimes
14 that carried a sentence of at least 5 years. *Id.* Because Defendant was
15 not subject to deportation he could not have relied upon § 212(c) relief
16 from deportation, therefore the ruling in *St. Cyr* does not apply to
17 Defendant. *Id.* At oral argument, counsel for Defendant argued
18 Defendant's original offense would have subjected Defendant to possible
19 deportation, but counsel did not provide any information to substantiate
20 this claim.

21 In support of its contention that individuals in circumstances
22 similar to Defendant could not have relied on § 212(c) relief, the
23 Government cites *Cordes v. Gonzalez*, 421 F.3d 889 (9th Cir. 2005).
24 However, the conclusion of the Ninth Circuit in *Cordes* was that failure
25 to apply the rule in *St. Cyr* to defendants who were not originally
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1 convicted of a deportable offense was in fact a violation of equal
2 protection. *Cordes*, 421 F.3d at 899.¹

3 However, the question in the instant case is not whether Defendant
4 was denied equal protection in his original deportation, but whether
5 there was a defect in the process that resulted in a denial of
6 Defendant's due process rights. In a similar case, the Ninth Circuit
7 found it was not fundamentally unfair for an IJ, prior to the ruling in
8 *Cordes*, not to advise the defendant of a possible equal protection claim.
9 *United States v. Rivera-Sanchez*, 172 Fed. Appx. 739, 740 (9th Cir. 2006).
10 Thus, in 1997 when Defendant went before the IJ, Defendant's deportation
11 was not defective as a matter of due process, even though he might be
12 able to challenge a similar deportation on direct appeal under the
13 current case law. Therefore, Defendant's Motion to Dismiss is denied in
14 part.

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17 ¹ The plaintiff's argument in *Cordes* was she would have been at risk
18 of deportation had she originally been convicted of a more serious
19 offense, and thus also could potentially have benefitted from § 212(c)
20 relief. *Cordes*, 421 F.3d at 897. Further, it would be a violation of
21 equal protection to allow a more serious felon to benefit from the rule
22 in *St. Cyr* and deny her the same protection. *Id.* In *Cordes*, the Ninth
23 Circuit found that the disparate treatment between Ms. Cordes and
24 similarly situated residents who would have been entitled to § 212(c)
25 relief under *St. Cyr* and those like herself and like Defendant, who were
26 not entitled to such relief, lacked a rational basis. *Id.*

1 2. December 2000 Reinstatement

2 While Defendant does not present evidence regarding the specific
3 facts of his case, he argues the general process by which he was removed
4 is violative of due process. (Ct. Rec. 31 at 3-4.) Defendant's order
5 of removal was reinstated based on regulations under 8 C.F.R. § 241.8.
6 In pertinent part, the regulation holds that in the context of the
7 reinstatement of a removal order "[t]he alien has no right to a hearing
8 before an immigration judge" *Id.* To support his contention that
9 this process violates his due process rights, Defendant cites *Morales-*
10 *Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004), which holds that
11 the implementing regulations at 8 C.F.R. § 241.8 conflict with INA §
12 240(a), and that an immigration judge must conduct all proceedings
13 deciding the deportability of an alien. *Morales-Izquierdo*, 388 F.3d at
14 1305. However, the opinion in *Morales-Izquierdo* was later withdrawn and
15 cannot be cited as precedent. *Morales-Izquierdo v. Gonzales*, 423 F.3d
16 1118 (9th Cir. 2005). Thus, the current rule in the Ninth Circuit with
17 regard to the validity of the reinstatement of a removal order reverts
18 to *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001),
19 holding that the reinstatement process does not offend due process.
20 Because Defendant does not allege any specific facts regarding the
21 circumstances of his most recent removal, and because the reinstatement
22 process generally has been held to comport with due process, Defendant
23 is unable to satisfy the first prong of the test in *Zarate-Martinez*
24 requiring a showing of a defect in the proceeding that violates due
25 process. Therefore, Defendant's Motion to Dismiss is denied.

1 **II. Other Motions**

2 The Court denies Defendant's Motion Re: Grand Jury Transcripts,
3 finding Defendant failed to demonstrate a particularized need to review
4 the transcripts prior to the testimony of the witnesses.

5 After denying Defendant's Motion to Dismiss, counsel for Defendant
6 orally moved for a continuance based on Defendant's intent to enter into
7 plea negotiations with the Government. The Court granted Defendant's
8 motion.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion to Dismiss (**Ct. Rec. 31**) is **DENIED**.

11 2. Defendant's Motion for Discovery Re: Grand Jury Transcripts (**Ct.**
12 **Rec. 32**) is **DENIED**, with leave to renew.

13 3. Defendant's oral Motion to Continue is **GRANTED**.

14 4. The **Pretrial Conference** is **RESET** from September 18, 2006, to
15 **September 27, 2006**, at **9:00 a.m.** in **Richland**, Washington. At this
16 hearing, the Court will hear all pretrial motions, including motions *in*
17 *limine* and *Daubert* motions.

18 5. Trial briefs, requested voir dire, and joint proposed jury
19 instructions shall be filed and served **NO LATER THAN October 20, 2006**.
20 Joint jury instructions should only address issues that are unique to
21 this case, and shall include instructions regarding the elements of each
22 claim or defense, and a proposed verdict form.

23 6. The **jury trial** is **RESET** from **September 25, 2006**, to **October 30,**
24 **2006**, at **9:30 a.m.** in **Yakima**, Washington. **Counsel shall meet with the**
25 **Court in Chambers at 8:45 a.m. on the day of trial.** **Any motions**
26 **unaddressed at the pretrial conference shall be heard in open court on**

1 the day of trial at 9:00 a.m., at which time the Defendant shall be
2 present.

3 IT IS SO ORDERED. The District Court Executive is directed to enter
4 this order and to provide copies to counsel, the U.S. Probation Office,
5 the U.S. Marshal, and the Jury Administrator.

6 DATED this 21st day of September 2006.

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8 S/ Edward F. Shea
9 EDWARD F. SHEA
United States District Judge

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